NO. 43674-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

ALAN J. VEYS; LONE EAGLE RESORTS, INC.; and
ALAN J. VEYS PROPERTIES, LLC,

Appellants,

v.

MICHAEL LONG; ANN LONG;
OFFICE OF P. MICHAEL LONG; and
P. MICHAEL LONG, P.S., INC,

Appellees.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Diane M. Woolard, Visiting Judge

REPLY BRIEF OF APPELLANTS

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INTRODUCTION

Respondent Long[1] attempts to mischaracterize this as a case focused on whether Alan Veys knew that the PSA was a binding contract and chose to breach it. In the Respondents' Reply Brief ("Long's Brief"), Long argues that Veys lost the summary judgment motion because he could not overcome evidence that his decision to breach the contract to sell Pybus Point Lodge prompted the aggrieved purchasers to sue him. Long asserts that only on appeal does Veys press "another theory, *i.e.*, that Long's conduct regarding the transaction caused Veys damages due to his loss of the prerogative to walk away from the deal that he had made but which he chose to breach." Long's Brief, p. 1.[2]

The record belies Respondent's assertion. Mr. Veys has acknowledged at the trial level and on this appeal that he was bound by the actions of his agent -- attorney Michael Long. The Wyoming jury confirmed that obligation in issuing its verdict. Mr. Veys' case against Mr. Long is significantly premised on the fact that Mr. Long's release of

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[1] As in Plaintiffs'/Appellants' opening brief, Plaintiffs are collectively and interchangeably referred to hereinafter as "Plaintiffs", "Mr. Veys" or "Veys." Mr. Long and his law firms and Mrs. Long are collectively and interchangeably referred to hereinafter as "Long," "Respondent(s)" or "Attorney Long."

[2] Defendant/Respondent Ann Long generally adopts the arguments made by attorney Long and, thus, Veys' response addresses allegations made in Long's Brief in response to Vey's opening brief.

Mr. Veys' pre-signed, signature page to the purchasers effected a sales contract that committed Mr. Veys to the unfavorable contract to sell the lodge (the "PSA"). Mr. Veys asserted in his complaint and in opposition to the motion for summary judgment that attorney Long was negligent in that: Long failed to protect his clients' expressed interest while negotiating and participating in the drafting and review of the PSA; failed to adequately consult with Veys with regard to the content of the PSA; failed to assure that Veys had received, reviewed and understood the PSA prior to committing him to the contract and, ultimately, providing incorrect advice to Mr. Veys regarding the legal enforceability of the contract. In opposition to summary judgment Veys explained that he would have been in a better position had Long properly advised him and competently represented him in negotiating and executing the PSA. Veys' explanation of the role that Long's negligence played in the series of events leading to Veys' injury is not speculative. Long took direct, physical and irrational action that bound Veys to the PSA; action that should make any capable attorney cringe. Long, without adequately consulting with his client, without assuring that his client had seen the PSA, had been made aware of its terms and without assuring that his client intended to be bound by, or could satisfy, those terms, released a pre-signed, signature page that had

been placed in his trust and, with that release, effected execution of the PSA binding his client to that unfavorable contract. But for that act, Veys would have walked away from the deal and kept the lodge property.

DISCUSSION RE: FIRST ASSIGNMENT OF ERROR

From Mr. Veys' perspective, the first assignment of error should be framed: where Veys shows that "but for" Long's negligence, he would not have been bound by the PSA and would have avoided a $3,000,000 judgment, has he shown that Long's conduct "probably caused" the alleged injury?

For purposes of their summary judgment motion, Long conceded that an attorney-client privilege existed between attorney Long and Veys giving rise to a duty of care; Long also conceded that his conduct fell below the standard of care. Long contests only whether his negligence was the proximate cause of the injury. CP 149.

Long explains that,

> [t]o survive a motion for summary judgment in a legal malpractice action stemming from a failed business transaction, a former client must show that deficiencies in the contract attributable to the lawyer caused the harm about which the client now complains; specifically, the client "...needs to demonstrate that a better contract or full disclosure would have prevented the injury or improved his recovery.' [*Smith v. Preston Gates Ellis, LLP,* 135 Wash.App 859 (2006)] at 864, 149 P3d 600. In a failed

> business transaction case, the aggrieved client must show '...that 'but for' these deficiencies in the contract he would have had a better result.' *Id* at 865, 147 P.3d 600.)

Long's Brief at p. 21.

To satisfy the "but for" test, a plaintiff need only show that the act complained of "probably caused" the alleged injury. *Daugert v. Pappas*, 104 Wn. 2d 254, 260, 704 P. 2d 600 91985). Long acknowledges that Veys need only show that he would have obtained a better result but for Long's negligence. *See Smith v. Preston Gates Ellis, LLP*, 135 Wash.App. 859, 864, 147 P.3d 600 (2006).

Mr. Veys has clearly and consistently asserted that had attorney Long properly done his job, Veys would have achieved a "more favorable outcome" at the end of the negotiation... he would not have entered into the PSA. CP 152; CP 774, ¶5; CP 607. See, *Ludlow v. Gibbons*, Case No. 10CA1719 (Colorado Court of Appeals, Nov. 10, 2011)

Veys asserts that had attorney Long made him aware of the contents and failings of the PSA before committing him to the contract, he would have "walked away" from the deal.[3] Long admitted in his summary judgment motion that if Veys had pushed for any of the

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[3] The allegations of negligence as to the Applequist Transaction and Mr. Veys assertion that he would not have entered into the Complaint had he been made aware of its failings, are found at Complaint, ¶¶ 31-64, 106-123 and 130.

conditions that he wanted in the PSA, the Buyers would have "walked away" from the deal as friends. Buyers' attorney Scheer concurred. CP 15, ln.10; CP 292, ¶10. But for Long's extraordinary negligence, Veys would not have entered into the PSA, would not have breached the PSA and would not have been sued by the buyers. Whereas Long asserts that Veys created the risk of a lawsuit when he chose not to honor the PSA and sell the lodge, Long's' Brief at 18, Veys asserts that Long created the risk of breach by binding his client to a contract that he had not seen, without first reviewing its terms and without obtaining assurance that Veys was willing to enter into the contract as drafted.

Respondents agree that proximate cause is usually the province of the jury, *Brust v Newton*, 70 Wash.App. 433, 438, 628 P.2d 1336 (1981), and should be determined by the court as a matter off law only if "reasonable minds could not differ." *Hertog v. City of Seattle,* 138 Wash.2d 265, 275, 979 P.2d 400 (1999). Long asserts that it is impossible for reasonable minds to conclude that his conduct was a proximate cause of the injury suffered by Mr. Veys. Long's Brief at p. 23. In his attempt to so convince this Court, Long chooses to completely disregard evidence in the record. To the extent Long acknowledges evidence contrary to his position, he deems it incredible and discounts it altogether.

Long does not, nor can he, deny that at no time prior to June 16, 2004, a full two weeks after Long released the signature page, did Veys receive or reviewed the PSA to which Long committed him. CP 775; Opening Brief, pp. 17–27. Long does not deny that he failed to review, explain or seek Mr. Veys' approval of the content of the PSA prior to releasing the signature page. Long offers no evidence to belie Mr. Veys' assertion that he would not have entered into the PSA had he known that it did not reflect his intent or that Long had not assured that it contained his client's critical needs and conditions.

Long's primary argument is that summary judgment is appropriate because Veys cannot establish that Long's negligence was the proximate cause of damages or that Veys would have obtained a **better result** than he did **but for** Long's negligence. CP 152.

Relying on *Smith v Preston Gates Ellis, LLP, et al,* 135 Wn. App. 859, 947 P. 3d 600 (2006), Long argues that in order to show "proximate cause," Veys has to show that he would have obtained a "better result" or "more favorable outcome" then he did but for Long's alleged negligence. CP 152. In *Smith v. Preston Gates,* plaintiff Smith brought a legal malpractice case for negligence relating to the drafting of a construction contract on his "dream home." Smith alleged that had his attorney

advised him of the numerous problems with the contract, he never would have signed it. The court considered Mr. Smith's assertion but concluded that there was no proximate cause because plaintiff Smith offered only conjecture and speculation as to his alternative. *Smith v. Preston Gates*, 147 P. at 603. Smith did not specifically identify an alternative that would have led to a better outcome. He explained, "I can't tell you what I would have done but I would not have entered into this contract." Smith could only speculate that he might have looked for another builder but that he was committed to building his "dream home." *Id.*

Long's recitation of the operative facts in *Smith*, highlight the strength of Mr. Veys position herein. See Long's Brief at 27. Unlike the case at hand, Smith had knowledge of the contract's deficiencies when he signed it, had other reasons for proceeding with the contract and offered only speculative options that he might have pursued in the alternative. *Id.* at 869, 147 P3d 600. By contrast Veys, was never allowed the opportunity to review the contract to which Long bound him, was not consulted by Long prior to release of the signature page and was unaware that the contract afforded purchasers the unilateral right to dictate final terms notwithstanding Veys' desires and needs. Veys had no compelling

reason to enter into this sales contract or any other contract for sale of the lodge. He was in a position to walk away.

Veys has offered testimony and evidence of a non-speculative "better outcome." In his opening brief and in opposition to the summary judgment, Veys offered evidence of his intent and expressed position both before and after the execution of the PSA that he was not completely committed to selling the lodge. See Opening Brief, pp. 35-36; CP 774, ¶5; CP 607, 676, 682, 690, and 777, ¶18. Veys advised Buyers from the outset of their discussions that he was neither in need of nor insistent upon selling the Lodge and was prepared to walk away from the deal in the face of any problem or disagreements on the terms of the sale. CP 774, ¶5; CP 607. Veys repeatedly informed Long that he would not sell the lodge unless the sale accommodated the terms and conditions critical to him, including when he so advised his attorney on June 14, 2004, CP 676, on June 15, 2004, CP 682, on June 16, 2004, CP 690, and again on June 18, 2004. CP 777, ¶18. Walking away from the deal and taking the Lodge off of the market would have realized a better outcome for Veys than a $3,000,000 judgment against him. In any event, Veys shows that he sold the Lodge to another purchaser in 2009 for $3,000,000, a price greater then the selling price to the Applequist Group; certainly a better result.

See Boguch v. Landover Corp., 224 P.3d 795, 153 Wash.App. 595 (Wash. App., 2009). (In analyzing whether Boguch has met his burden of production on the element of proximate cause, we are guided by the reasoning in cases involving clients' claims of professional negligence against their attorneys. To prevail on a claim that a real estate agent's negligence caused a financial loss on the sale of property, the property owner must show that, but for the agent's negligence, he or she would have sold the property on terms more advantageous than those of the eventual sale.) Unfortunately, having incurred approximately $4,000,000 in judgments, fees and attendant costs resultant of the PSA, Veys has suffered a significant net loss notwithstanding the subsequent sale. CP 777, ¶ 20.

There is sufficient evidence in the record to allow a jury to conclude that Veys would not have entered into the PSA and would have opted not to sell the Lodge at all.... a better outcome that would have been achieved had Long fully disclosed the consequences of entering into the PSA as drafted. See CP 21-24, Opening Brief pp. 8, 9-11, 41-42. The jury may also conclude that had Veys, after receiving competent advice from his attorney, decided to forego a sale to the Applequist Group, he ultimately would have sold the Lodge in 2009 for $3,000,000 and have

netted a positive $3,000,000 profit rather than a $1,000,000 net loss. CP 777, ¶ 20.

Long counters Veys' evidence by expressing that "[i]t is unclear how the substance of the circumstantial evidence supports Veys' position. Long's Brief at p. 28. He then discounts Mr. Veys' affidavit filed in response to Long's Motion for summary judgment, CP0772-CP0781, by deeming it speculative and self-serving. The measure of the credibility of that evidence is properly within the province of the jury.

Appellant Veys submits that his motivation, his knowledge and intent, Mr. Long's failings and the effect thereof, are matters for the jury to evaluate and determine. Summary judgment may not issue as a matter of law where, as here, there exist numerous issues of fact and evaluation of the impact of the facts. Summary judgment should not issue as a matter of law where such conclusion requires a judicial finding that all of a plaintiff's evidence is speculative, self-serving and lacking in credibility. Such evaluation is one for the jury to undertake.

DISCUSSION RE: REMAINING ASSIGNMENTS OF ERROR

Long admits that whether or not intervening acts are reasonably foreseeable is normally a question for the jury. Long's Brief at p. 31, citing *McCoy v. Am. Suzuki Motor Corp.,* 136 Wash 2d 350, 358, 961

P.2d 952 (1998); (additional citations omitted). Veys agrees and submits that summary judgment should not have entered in favor of Respondents on the issue of intervening cause

Veys submits that the points raised by Appellants as to the remaining assignments of error are sufficiently addressed in his Opening Brief on Appeal and relies thereon.

CONCLUSION

For all such reasons and for reasons that may be presented at oral argument, Mr. Veys respectfully requests that this Court conclude that Long's motion for summary judgment should have been denied, vacate the ruling dismissing Plaintiffs' claims with prejudice and remand this matter the trial court for further proceedings and trial.

DATED this 10th day of May, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I caused to be served a true and correct copy of the foregoing *Brief of Appellant*, as follows:

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